Neutral citation [2022] CAT 46

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1404/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

14 October 2022

Before:

SIR MARCUS SMITH
(President)
PROFESSOR JOHN CUBBIN
EAMONN DORAN

Sitting as a Tribunal in England and Wales

BETWEEN

DAVID COURTNEY BOYLE

Class Representative

-and-

(1) GOVIA THAMESLINK RAILWAY LIMITED
(2) THE GO-AHEAD GROUP PLC
(3) KEOLIS (UK) LIMITED

Defendants

-and-

SECRETARY OF STATE FOR TRANSPORT

Intervener

Heard remotely on 14 October 2022

RULING (STRUCTURE OF TRIAL)

APPEARANCES

Mr Charles Hollander KC and Mr David Went (instructed by Maitland Walker LLP) appeared on behalf of the Class Representative.

Mr Paul Harris KC, Ms Anneliese Blackwood and Mr Michael Armitage (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Defendants.

Ms Anneli Howard KC and Mr Brendan McGurk (instructed by Eversheds Sutherland (International) LLP) appeared on behalf the Intervener.

1. The question before us at this case management conference concerns the structure of the trial that should take place at the conclusion of these proceedings. We will leave, for separate debate, the various mountains that need to be climbed in order to get satisfactorily to trial. This ruling is solely concerned with the question of the structure of the trial itself.

2. The Tribunal has heard from the three parties before us. This is a case where Mr Boyle acts as the Class Representative, represented by Mr Hollander KC; where the Defendants, three railway operators, are represented by Mr Harris KC; and where there is a prospective Intervener, in the shape of the Secretary of State for Transport, represented by Ms Howard KC.

3. We should make clear that we are going to drop the qualification "prospective" from the term "Intervener". There is no dispute amongst the parties, and no doubt in the Tribunal's mind, that the Secretary of State for Transport must at certain stages of these proceedings play what we have termed an "aggressive" role of intervention. Precisely the nature of that role, as with other directions, can be articulated in due course. But the Tribunal wants to make clear that this is a case where (at certain stages of the trial process, however it is broken up) the Secretary of State for Transport needs to be before the Tribunal.

4. The real question in terms of trial structure is whether this should be a three-stage trial or a two-stage trial. There is no disagreement between the parties that the final stage, be that stage 2 or stage 3, should be effectively a quantum stage. Quantum includes, in that description, questions of causation.

5. It is common for case management directions to hive off and separate questions of liability and quantum. Causation often floats like an orphan child between the liability and the quantum phases, but in this case all of the parties are agreed that the orphan ought to be adopted by the quantum parent rather than the liability parent, and we agree.

6. We also agree that the split, the hiving off of quantum so defined, should take place. The reasons why quantum is often hived off are because, as is self-evident, if the liability issues go the way the Class Representative does <u>not</u> want,

in other words if the case is lost on liability, no work need be done on quantum and those costs are saved. That is why it is often done, and in this case we are satisfied that the costs of dealing with the quantum stage would not be minimal, they would be considerable; and it is therefore well worth effecting the split.

7. The Tribunal explored with Mr Hollander whether, as put by us somewhat tendentiously, the question of quantum was simply a matter of pressing a few buttons on the database extracted by the parties' respective quantum experts. If that were the case, it would be an indicator against splitting liability and quantum. But it is quite clear that far more will be involved in terms of the quantification exercise, including a substantial counterfactual analysis. We will not go into this in any great detail. The Tribunal will simply put on the record that we are satisfied, as matters stand at the moment, that it is sensible to hive off questions of quantum.

8. We have attached considerable weight to the fact that Mr Hollander, representing Mr Boyle, the Class Representative, has himself advocated a split of the quantum issues. He recognised, rightly, that it is obviously in the interests of any claimant class to get to a final outcome as quickly as possible. *Prima facie*, one wants to deal with liability and quantum together. The fact that Mr Hollander has not advocated this, but has indicated very carefully that quantum ought to be hived off, carries a considerable amount of weight with us. Obviously, if liability is a success from the Class Representative's point of view, the delay occasioned by a later resolution of the quantum issues will be compensated for in interest in the usual way.

9. So, we have for those reasons no doubt that there needs to be a split trial and that the final stage of that trial should be quantum, including the questions of causation.

10. It is going to be a moot point whether a question of set-off falls within or without the "quantum issues" to be heard separately. This was something that was articulated briefly by Mr Harris. The Tribunal wants to make clear that although, in labelling terms, "set-off" is undoubtedly a quantum question, we would be minded to include this question at an earlier stage even though its

designation is properly as a quantum issue. The reason we consider it should be dealt earlier is because the point is a pure point of law. It is, as a general rule of thumb, better to determine issues that do not involve additional expense earlier in the proceedings, rather than later. Here the question of set-off will assist and inform the question of quantum, and so should be determined at an earlier stage.

11. The Tribunal mentions this so that the parties are clear about what was a minor but nevertheless important issue in terms of demarcation of which issues belong where.

12. Case management, including the splitting of trials and the framing of preliminary issues, is quite fundamentally an exercise in pragmatism. The Tribunal must bear in mind how far it can proceed in hiving off certain issues, and in doing so it must consider two things. First of all, the cost-benefit in hiving off; but secondly, the viability of any trial where those issues have been hived off.

13. These are questions which cannot, obviously, be finally determined at this, early procedural stage. We are in the early foothills of this litigation and it would be wrong to reach a finally concluded view on anything substantive. Hence the pragmatic view. This Tribunal is concerned with risk management and the risks that we must ensure are avoided are (i) the unnecessary escalation of costs, but (ii) also the need to have an effective trial that is not derailed by a risk of certain points not being before the court at the relevant and appropriate time.

14. So, that is broadly the pragmatic exercise that we are seeking to resolve. With that introduction, we turn to the question of whether this should be a three-stage trial or a two-stage trial.

15. Mr Harris was the prime advocate of a three-stage trial, but he was supported by Ms Howard on the part of the Secretary of State for Transport. Mr Hollander, for the Class Representative, was of the view that a further split, apart from the one that we have already described, was not merely unnecessary, but undesirable in the pragmatic sense that I have explained.

16. Mr Harris' point was that there was one issue which very naturally belonged in his stage 2, and that was the question of market dominance. Market dominance, to be clear, involves a range of issues: it involves defining the relevant markets and then ascertaining within those markets what market power a particular undertaking has.

17. Mr Harris' proposal was that these questions, which contain within them really quite fundamental questions as to market structure, for one cannot identify substitutability in terms of market definition without understanding market structure, could simply be assumed for the purposes of stage 1 of the trial, which would deal – amongst other things – with the question of abuse. In other words, one would assume dominance without further articulation or unpacking, deal with certain issues at stage 1 but not with dominance, and then, if it was necessary, deal with dominance at stage 2.

18. Mr Harris was quite clear that, given the early stage of these proceedings, the question of dominance might be joined by other issues. That is an entirely fair point to make and one that we bear in mind. This is not a question of finally framing what goes into the putative stage 2; it is a question of working out whether it is sensible to try the question of dominance separately from certain other questions, including, in particular, abuse of any such dominance.

19. The Tribunal does not need to go into what the other questions might be. We used, for purposes of parsing the issues, the issues identified in paragraph 6 of the Defendants' defence. Mr Harris was quite clear that a number of these issues, but not the question of dominance, naturally belonged to stage 1, and that these issues, if determined in a particular way, could be determinative of the entirety of the proceedings. In other words, if the Defendants were successful on one or more of these issues at stage 1, the case could come to a conclusion then.

20. In particular, Mr Harris' submission was that the question of an abuse of the (assumed) dominant position would bring the case to an end without the very substantial question of whether there was market dominance ever troubling the court.

21. The question, then, is what exactly are the savings that such an outcome, the deferral of the question of market dominance to stage 2, would result in, and what are the risks? The savings are that the economic evidence, and there would be economic evidence needed to understand the question of dominance, would not be incurred until the answer or outcome to stage 1 had been determined. We accept that the cost of economic evidence is high both in terms of time and in terms of money.

22. We turn to the alternative consideration, of what is the price one pays for dividing the proceedings into three stages rather than two? The first part of that price is, quite obviously, delay. What is envisaged is a three-stage process, with evidence being articulated separately for each stage, which will inevitably push the case in terms of final resolution well into 2024. That is presuming a stage 1 being heard in the latter part of 2023, and no appeals.

23. That is undoubtedly a downside, but it is one that Mr Hollander has already in part accepted in hiving off the quantum issues.

24. The second downside is much harder to frame, and turns very much on the pragmatic considerations of the Tribunal as to how the trial will unfold. The viability of the split articulated by Mr Harris depends upon questions of dominance being hermetically sealed from questions of, for instance, abuse and regulatory non-compliance and compliance.

25. If Mr Harris is right, and these questions are hermetically separable, then the only downside is delay. It is no part of the Tribunal's duty today to reach a concluded view on this question. Indeed, we cannot possibly do so. But we must reach a view as to the risks. The question we are really being asked is this: are we prepared, at this early stage of the proceedings. to say that we will exclude from all consideration, and ask no questions in relation to, issues of market structure, market definition and dominance, when we are trying the stage 1 issues?

26. The issue is, it seems to us, as stark as that. If we adopt this structure, taking on a self-denying ordinance, which means that we would be closing out the

opportunity to ask questions in these stage 2 areas throughout the stage 1 process. Of course, were it to emerge that we needed to ask questions, we would not restrain ourselves. But what we would have to do, if we adopted a three-stage process where stage 2 questions did become relevant at stage 1, would be to adjourn in the middle of a stage 1 trial, to enable the stage 2 issues to catch up.

27. That is a very significant risk in terms of cost and time. So we need to be, pragmatically speaking, extremely confident that the sealing-off or stove-piping of stage 1 from stage 2 is practical, because the risks of getting this wrong, especially at this early stage, are substantial.

28. We are, as presently advised, not satisfied that we can be as sure as that. Of course, we accept that in other cases dominance has been assumed and abuse has been litigated in advance of dominance for precisely the reasons articulated by Mr Harris in this case.

29. But those cases were, if we may say with all due respect to the facts in those cases, rather more straightforward than this case. This case, as we have not articulated in this ruling but as appears in the pleadings, contains a number of extremely significant public law questions in relation to which we would want to hear and will hear the Intervener.

30. We do not think that this complexity enables us to conclude with the requisite degree of certainty that the efficiencies of hiving off the question of dominance justify the risks of a catastrophic failure of the liability trial if we were to parse and separate the liability issues into stages 1 and 2 as suggested.

31. Although we do not place very much weight on this, it does seem to us that this sense that a split of liability issues is undesirable was reinforced by the fact that the Secretary of State for Transport, quite rightly in our view, indicated that the question of market structure, market definition and market power could have wider ramifications in other public transport industries apart from the ones here in issue. Unsurprisingly, the Intervener would want – in some way – to be present at the hearing of these issues. We think that is right, and we think that

is a factor, a material but limited factor, that also points in the direction of a non-splitting of liability issues. We stress that we regard this factor as confirmatory only of a conclusion that we had reached in any event. But it is confirmatory of that conclusion.

32. Accordingly, we are going to direct that there be a split trial with questions of quantum, as we have defined them, hived off to stage 2, and all other questions dealt with at stage 1. We are going to seek to list this stage 1 for hearing after the summer vacation in 2023. We will endeavour to start it not immediately on the commencement of the new term in 2023, but as late as is feasibly possible to ensure that stage 1 is tried so as to finish, with judgment being reserved, in the course of that term.

33. We are going to allocate four weeks in our diaries for this case. This is in excess of what the parties have asked for, even if (as we are minded to order) a widely framed stage 1. We do that on the basis that it is more easily possible to shorten a trial than it is to lengthen it. We are conscious that the submissions of the parties was that for an all embracing (minus quantum) stage 1, three weeks would probably be necessary, with two weeks being necessary for a more limited stage 1. We are not going to hold the parties to those estimates. We consider that it is safer to allocate more time rather than less, and four weeks is our sense of what should be allocated. We will leave it to after this hearing to determine exactly when these four weeks should be diarised in the October to December 2023 period.

34. We would only say one final thing. As has been repeatedly stated in the course of this ruling, we are at the early stages of these proceedings. It is important that one gets a grip of a case quickly at these early stages so as to give the pre-trial steps shape and to ensure that the trial or trials are brought on as swiftly as possible. But we readily acknowledge that we are in the early stages of a steep learning curve. If there were to be a material change in the way the issues are parsed, such that a reorganisation of the trial structure is something that ought to be mooted again, then that is something that we would be minded to hear. It seems to us that Mr Harris was making a series of points intended to assist; and we have rejected those points. But we have done so because, in all frankness,

the risk/benefit analysis did not favour his articulation of those points at this stage. However, as we have said, we are in the early foothills and it seems to us that it is far easier to split a two-stage trial into three, than to reassemble a three-stage trial into two. That, too, is a factor that we have borne in mind.

35. So, if there is a material change in the understanding of the parties as to how the trial should be structured, then there is a liberty to apply to re-frame matters. We expect that liberty to be exercised responsibly, as we are sure it would be, but the Tribunal wants to make it clear that the material change that would justify further application lies less in a factual development and more in a greater understanding of the nature of the issues that fall to be determined in this case, which, as we hope is tolerably apparent from this ruling, is more than averagely complex in terms of the competition law issues it raises, in particular the questions of public competition law as opposed to the more usual fare of private competition law.

36. So for those reasons we are going to direct a two-stage trial at this stage of the proceedings.

37. This judgment is unanimous.

Sir Marcus Smith
President

Professor John Cubbin

Eamonn Doran

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 14 October 2022